IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 3, 2010 Session

HARBOUR SUBDIVISION P.O.A., INC. ET AL. v. JOHN C. LOWE ET AL.

Appeal from the Chancery Court for Johnson County
No. 5900 G. Richard Johnson, Chancellor

No. E2008-00974-COA-R3-CV - FILED MARCH 30, 2010

This is an action filed by a property owners' association and one of the property owners ("the plaintiffs") against several of the other property owners ("the defendants") to prevent them from renting their properties on a short-term basis. Initially, the trial court granted the defendants summary judgment. Later, upon hearing a motion to alter or amend, the court expressed concern that it had improvidently granted summary judgment and, then, sua sponte, ordered the case dismissed in its entirety but without prejudice. The plaintiffs appeal, arguing that the effect of the dismissal was to vacate the summary judgment, and, alternatively, that the trial court erred in granting summary judgment. The defendants contend that the trial court erred in dismissing the case after correctly granting summary judgment and denying the motion to alter or amend. We conclude that the trial court erred in dismissing the case. Accordingly, we vacate the order of dismissal and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the Court, in which HERSHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

William S. Nunnally, Greeneville, Tennessee, for the appellant, The Harbour Subdivision P.O.A., Inc.

Frank A. Johnstone, Kingsport, Tennessee, for the appellants, Willis Herren and Betty Herren.

L. Eric Ebbert and W. Derek Malcolm, Knoxville, Tennessee, for the appellees, John C. Lowe, Diane W. Lowe, Jane Lee Rankin, and William B. Cameron.

David Amundson, Winston Salem, North Carolina, appellant, Pro Se.

OPINION

I.

Willis Herren, and wife, Betty Herren ("the Herrens"), own a house and lot in The Harbour, a subdivision in Johnson County. All of the properties in the subdivision are subject to restrictions and all the property owners are members of Harbour Subdivision P.O.A., Inc. ("the Association"). The particular restriction at issue ("the restriction") states that the lots "are for, and shall be . . . use[d] as, single family residential purposes only."

The Herrens and the Association joined as plaintiffs in a complaint that asks for a declaration that the restriction prohibits the defendants from renting their properties on a short-term basis. The complaint alleges that the defendants are renting their houses in violation of the restriction and asks that the defendants be enjoined from renting on a short-term basis. The complaint names John C. Lowe, Diane W. Lowe, Jane Lee Rankin as Trustee of the Jane Lee Rankin Revocable Trust, William B. Cameron as Trustee of the William B. Cameron Living Trust, and David Amundson, as defendants.

After the case had been pending for approximately one year, the plaintiffs filed a motion for summary judgment. The defendants followed suit by filing their own motions for summary judgment. The plaintiffs asserted that the restriction prohibits short-term rentals as a matter of law. Defendants Cameron and Amundson asserted that they were entitled to summary judgment because they had never rented their houses. All of the defendants asserted that the restriction does not prohibit short-term rentals and that the plaintiffs failed to secure the approval of the requisite number of members, as required by the Association's bylaws, before filing the lawsuit. The court heard oral argument and granted summary judgment in favor of the defendants on the following three grounds: (1) that the governing board of the Association acted ultra vires without the approval of its members in filing the lawsuit, (2) that Cameron and Amundson had not rented their houses, and (3) that the subject restriction "permit[s] [members] to rent their homes, on a short-term basis or otherwise. . . ." The court reserved ruling on the defendants' request for attorney's fees. The Herrens filed a notice of appeal from the order granting summary judgment which was treated as a premature filing in light of the unresolved issue of attorney's fees. The trial court later, on July 18, 2008, entered an order denying attorney's fees to the defendants. The plaintiffs filed a timely motion to alter or amend the order granting summary judgment. The plaintiffs supported their motion with documents which included the charter and minutes of meetings of the members. The trial court held a hearing on the motion to alter or amend on October 10, 2008. The court invited discussion on the motion as follows:

> This is one of those cases [that] . . . never did have a rhythm, and candidly, I was dissatisfied with the picture-puzzle that was presented. So, I guess in some ways I'm not surprised that we're faced with a 59.04 motion. I'll let you present that now.

When counsel for the Association mentioned that its motion was based, in part, upon the Association's charter which was not to be found in the pleadings, the court volunteered that it had looked at "notes of this *trial*" and could not "find where either the Charter or the Restrictions were [sic] *in evidence*." (Emphasis added.) Despite an explanation that at least some of the pertinent documents had been attachments to the motions for summary judgment and statements of undisputed facts, the court responded as follows: "But they were not introduced as evidence. If you file a pleading and make an attachment to it, sure enough I can read it, but that doesn't make it in evidence." The court then proceeded to find that neither the charter nor the restrictions were "in evidence," and announced its ruling as follows when one of the attorneys "offer[ed]" the documents into evidence:

> It's too late. This is not the trial. . . . This Court declares a mistrial. This Court finds that the – alternatively, that it involuntarily dismisses without prejudice the Plaintiffs' lawsuit. This Court finds that the suit was tried on Motions for Summary Judgment where the Court was not informed, where the Court was denied the benefit of documents that could be determinative of the decision in this case where, for whatever reason, the Charter and the Restrictions and Reservations of the Harbour Subdivision were not introduced.
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> The Court finds that it would be unjust and inequitable to let this decision stand on the basis of some of the evidence. This Court wants all of the evidence in order to make an appropriate decision. . . .
>
> And so, I am declaring a mistrial first. And alternatively, if that is not acceptable to the Court of Appeals, then I just involuntarily dismiss without prejudice the Plaintiffs' lawsuit. Draw the order.

Counsel for the defendants attempted to argue that any missing documents were the fault of the party opposing summary judgment, but the court concluded the hearing with the following observation before reiterating its declaration of a mistrial or, alternatively, a dismissal "pursuant to [Tenn. R. Civ. P] 41-02":

> I have a responsibility to make sure that everything I consider is in evidence and that I get all of it and not part of it; and I'm dissatisfied with my judgment. . . .
>
> . . . Complete total justice has not been done in this case. I'm very dissatisfied with what has happened. And it would be unjust and inequitable to let the Court's judgment stand as it is.

The trial court's order entered subsequent to the hearing repeats the court's oral findings that neither the charter nor the restrictions were "properly offered or admitted into evidence" but denies the plaintiffs' motion to alter or amend. Instead, the order dismisses the case "without prejudice pursuant to Rule 41.02 of the Tennessee Rules of Civil Procedure." The plaintiffs timely amended their notice of appeal to encompass the order of dismissal.

II.

As we have noted, both sides of this dispute raise numerous issues concerning the trial court's order of dismissal and the summary judgment that preceded it. For reasons that will soon be apparent, we believe the dispositive issue on this appeal is whether the trial court erred in dismissing the case pursuant to Tenn. R. Civ. P. 41.02. We believe it is preferable to have the trial court address issues regarding what the trial court intended or should have done concerning the summary judgment in the first instance, and, accordingly, we pretermit all issues not related directly to the judgment of dismissal.

III.

The standard by which we review a trial court's involuntary dismissal at the close of a plaintiff's proof pursuant to Tenn. R. Civ. P. 41.02 (2) is *de novo* on the record. ***Cole v. Clifton***, 833 S.W.2d 75, 77 (Tenn. Ct. App. 1992); ***Kesterson v. Varner***, 172 S.W.3d 556, 566 (Tenn. Ct. App. 2005). If the trial court bases the dismissal on factual findings, we presume those findings to be correct unless the evidence preponderates to the contrary. ***Cole***, 833 S.W.2d at 77; *see* Tenn. R. App. P. 13(d). If the trial court makes no factual findings, we simply review the judgment for the preponderance of the evidence, without a presumption of correctness. ***Kesterson***, 172 S.W.3d at 566. An involuntary dismissal for failure to prosecute or otherwise abide by an order of the court is reviewed for abuse of discretion. ***Osagie v. Peakload Temporary Services***, 91 S.W.3d 326, 329 (Tenn. Ct. App. 2002). Likewise, a trial court's decision whether to alter or amend a judgment is reviewed under the abuse of discretion standard. ***Chambliss v. Stohler***, 124 S.W.3d 116, 120 (Tenn. Ct. App. 2003). We have held that the failure to follow controlling legal standards to the prejudice

of one of the parties constitutes an abuse of discretion. ***Overstreet v. Shoney's, Inc.***, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

IV.

The trial court's unexpected dismissal of the case was resisted by both the plaintiffs and the defendants. On appeal, it has generated the unusual result that the plaintiffs are arguing that the order dismissing their case was not in error, because what the trial court realized is that every other order in the case, and particularly the order granting summary judgment, was in error, and the trial court obviously intended to vacate every order that preceded the dismissal and allow the parties to start over. This argument is troubling in that it would require us to hold that the trial court meant to do in its order what it said it was not doing, *i.e.*, altering or amending the summary judgment to the point of vacating it. The defendants, on the other hand, argue that the trial court erred in dismissing the plaintiffs' case, but argue that every other order in the case, including the denial of the motion to alter or amend, was correct[1]. This argument is troubling because it would require us to ignore the trial court's explicit statement that it was not satisfied with its own judgment. We are also concerned that some of the court's statements at the hearing on the motion to alter or amend indicate a misunderstanding of the procedural posture of the case and the options available to the court. Accordingly, because it is readily apparent to us that the trial court erred in dismissing the case pursuant to Tenn. R. Civ. P. 41.02, and because of our concern that any other disposition of the case, or the issues advanced by the parties, would be premature, we will focus on the order dismissing the case, and leave the disposition of other issues to the trial court on remand.

Rule 41.02 of our Tennessee Rules of Civil Procedure provides for the involuntary dismissal of lawsuits as follows:

> (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.
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> (2) After the plaintiff, in an action tried by the court without a jury, has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the

[1]In the course of the appeal, L. Eric Ebbert and W. Derek Malcolm were allowed to withdraw as counsel of record for David Amundson. Amundson has been allowed to join in the brief filed on behalf of the other defendants.

> event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence; in the event judgment is rendered at the close of plaintiff's evidence, the court shall make findings of fact if requested in writing within three (3) days after the announcement of the court's decision.
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> (3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

We agree with the defendants that this case does not involve a failure to prosecute or a failure to comply with the Rules of Civil Procedure. Neither does the case involve a party's failure to comply with an order of the court. In fact, at the beginning of the hearing on the motion to alter or amend, the court commended the attorneys on both sides of the case for their fine and professional handling of the case. Accordingly, it is clear that subpart (1) of Tenn. R. Civ. P. 41.02 does not justify the dismissal.

Subpart (2) of Tenn. R. Civ. P. 41.02 is also unavailing as a justification for the dismissal. That subpart contemplates a trial on the merits "by the court without a jury," in which event dismissal is appropriate only when "the plaintiff . . . has completed the presentation of plaintiff's evidence" and only if "upon the facts and the law the plaintiff has shown no right to relief." ***Id***. In this case there was never a trial on the merits and, notwithstanding the trial court's concern that certain documents had not been offered into evidence, there was never a presentation of evidence. There was only a hearing on motions for summary judgment and a hearing on the motion to alter or amend the summary judgment. While it is sometimes appropriate to consider evidence upon hearing a motion to alter or amend, *see* ***Stovall v. Clarke***, 113 S.W.3d 715, 724 (Tenn. 2003), and while the material submitted in support of or in opposition to a motion for summary judgment should be of a type that would be "admissible in evidence," Tenn. R. Civ. P. 56.06, neither a motion for

summary judgment nor a motion to alter or amend is a substitute for a trial on the merits of "genuine and material factual matters." ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993).

The plaintiffs submit that the language in subpart (3) which speaks of "any dismissal not provided for in this Rule" means that a trial court has the discretion to dismiss cases for grounds not explicitly stated in Rule 41.02. This is a true enough proposition, as recognized in ***Harris v. Baptist Memorial Hosp.***, 574 S.W.2d 730, 731 (Tenn. 1978), but "this power must be exercised most sparingly and with great care that the right of the respective parties to a hearing shall not be denied or impaired." ***Id.*** "[T]he occasions for the proper exercise of this power are considered by [the Supreme] Court to be few indeed." ***Id.*** Finally, the language of subpart (2) of Rule 41.02 requires that any discretion be exercised with due consideration of the right of the parties to have their "evidence . . . heard and evaluated." ***Id.*** at 732. Because that did not happen in this case, any discretion the trial court exercised was necessarily flawed by its failure to follow the legal standards of the rule under which it purported to dismiss the case. Accordingly, we hold that the trial court abused its discretion in dismissing the case under the Tenn. R. Civ. P. 41.02 rubric.

As we have intimated, we are not inclined to address the other issues stated by the parties. We believe the better approach is to vacate the order of dismissal in its entirety, including the part which denies the motion to alter or amend, and remand the case to the trial court in the same procedural posture it was in just prior to the trial court's announcement of its "dismissal" ruling from the bench. Since the case will be in the same posture it was in at the time of the last motion hearing, and since the court's comments at the hearing indicate a misunderstanding of the options that were or were not available, we will offer a few observations of what the trial court may do without violating our order of remand, partly because these observations will help the trial court understand what it might have done in preference to an involuntary dismissal. None of our observations should be taken as a comment that any one of the several options is preferable to the other. In fact, some of the options are probably mutually exclusive, and any choice the trial court makes is subject to review in any subsequent appeal.

On remand, one possibility open to the trial court is to simply deny the motion to alter or amend, thereby making the summary judgment final and appealable. Another possibility is to grant the motion to alter or amend and somehow modify or vacate the summary judgment. In this posture, the trial court would have a wide array of possible routes. It might choose to reschedule a hearing on the motions and order or allow the parties to submit any evidentiary material in support of their positions by a date certain. It might simply vacate one ground of the summary judgment and allow others to remain intact. For example, it appears

that no one now seriously contends that either Cameron or Amundson have rented their houses. We can see how the trial court may be persuaded to allow that part of the summary judgment to stand even if it is dissatisfied with other parts. It might vacate the summary judgment in its entirety and allow the case to proceed to a trial on the merits. Having done that, at the conclusion of the plaintiffs' proof, the court is free to consider an involuntary dismissal pursuant to Tenn. R. Civ P. 41.02. Obviously, this is not an exhaustive list of possibilities. We reiterate that we are not saying which is the right approach or predicting how we will rule if there is an appeal of any disposition on remand. We are simply trying to help the trial court understand some of the options it had open when it dismissed the case, and some of the options that are still available on remand.

V.

The judgment of the trial court is vacated. Exercising our discretion, we tax the costs on appeal one-half to the appellants Willis Herren, Betty Herren and The Harbour Subdivision P.O.A., Inc., and one-half to the appellees, John C. Lowe, Diane W. Lowe, Jane Lee Rankin. This case is remanded to the trial court, pursuant to applicable law, for further proceedings consistent with this opinion.

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CHARLES D. SUSANO, JR., JUDGE